No. 96-792

(11)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LYNNE KALINA,
Petitioner,

v.

RODNEY FLETCHER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Prosecutor Kalina is entitled to absolute immunity for seeking an arrest warrant as an integral part of initiating a prosecution against Mr. Fletcher because, by statute and court rule, she functioned as an advocate for the state in the judicial phase of the criminal process. Nothing cited or argued by Mr. Fletcher places prosecutor Kalina outside the advocatory function and beyond the protection of absolute immunity.

This reply brief will make three points:

First, Ms. Kalina will explain that Mr. Fletcher's argument merely applies a label to Ms. Kalina's actions, while ignoring the advocatory function of those actions. A proper application of the functional analysis, however, re-

quires a consideration of both the nature and function of the act. The effect of a proper application of this analysis is to distinguish the signing of a document as part of an investigation, as occurred in *Malley v. Briggs*, 475 U.S. 335 (1986), from the signing of a document as part of the initiation of a prosecution, as occurred in the case now before the Court.

Second, Ms. Kalina will address Mr. Fletcher's erroneous assertion that a prosecutor who executes a certification in support of an arrest warrant is analogous to a common law complaining witness. Unlike a complaining witness, the prosecutor functions as an advocate for the state. That difference between the function of the witness and the function of the prosecutor is dispositive on the immunity issue.

Third, Ms. Kalina will briefly address Mr. Fletcher's suggestion that recognizing absolute immunity here would represent an expansion of the law. In fact, Ms. Kalina's actions fall well within the limits of conduct to which this Court has accorded absolute immunity.

ARGUMENT

I. THIS COURT'S FUNCTIONAL ANALYSIS REQUIRES MORE THAN APPLICATION OF A LABEL TO AN ACT, AND CONTEMPLATES AN INQUIRY INTO THE NATURE AND FUNCTION THAT THE CHALLENGED ACT SERVES WITHIN THE CRIMINAL PROCESS.

A prosecutor's advocatory activities which are "intimately associated with the judicial phase of the criminal process . . . [are] *functions* to which the reasons for absolute immunity apply with full force." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (emphasis added). This Court therefore has consistently focused on the "nature" and "function" of the challenged activity to determine whether the activity falls within the scope of absolute immunity.

See Mirales v. Waco, 502 U.S. 9, 13 (1991) (per curiam); *see also Richardson v. McKnight*, No. 96-318, ——S. Ct. ——, 1997 WL 338548, at *6 (June 23, 1997) (discussing the use of functional analysis to determine whether absolute or qualified immunity attaches). Where "the prosecutor's actions are closely associated with the judicial process," absolute immunity applies. *Burns v. Reed*, 500 U.S. 478, 495 (1991). Determining whether the challenged activity is closely associated with the judicial process does not require an "inquiry into the actor's subjective intentions," as Mr. Fletcher suggests. *See* Brief for Respondent at 15. Either the challenged function is closely associated with the judicial process as an objective matter, or it is not.[1]

Here, the critical distinction between this case and *Malley* arises from the intimate association of Ms. Kalina's advocatory actions with the initiation of the judicial process. In *Malley*, the police officer's filing of a criminal complaint in a grand jury system was not advocatory and did not initiate a prosecution.[2] While the police officer's act

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[1] Mr. Fletcher accuses Ms. Kalina of urging this Court "to add a step to its 'functional analysis' of immunity issues, a step that would focus on the 'nature and function of a particular act, not on the act itself.'" Brief for Respondent at 14. This step is nothing new. Rather, this Court's decisions in *Mirales* and *Stump v. Sparkman*, 435 U.S. 349 (1978), make clear that the function of the act, and not the label applied to the act, determines whether immunity attaches.

[2] In an effort to blur the distinction between this case and *Malley*, the court below argued that "Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*." *See Fletcher v. Kalina*, 93 F.3d 653, 655-56 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (1997); JA 27. This is not true, for the simple reason that Ms. Kalina's actions were inextricably intertwined with her decision as an advocate to initiate a prosecution, while the police officer in *Malley* did not play an advocate's role in deciding whether to prosecute. The distinction from *Malley* thus illustrates Justice Kennedy's observation in *Buckley v. Fitzsimmons*, 509 U.S. 259, 289

may have been "a vital part of the administration of criminal justice, [it] is further removed from the judicial phase of criminal proceedings than the act of a prosecutor" who, as an advocate for the state, actually initiates a criminal prosecution. *Malley*, 475 U.S. at 342-43. In contrast, every aspect of Ms. Kalina's advocatory conduct implemented the inherently prosecutorial decision to charge Mr. Fletcher with a crime.

This Court has noted that "[t]he common law has never granted police officers an absolute and unqualified immunity . . . ." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). The Court has recognized that there is an inherent difference between the functions a police officer and a prosecutor perform within the criminal justice system. A prosecutor initiates criminal charges; a police officer does not.[3]

Every aspect of Ms. Kalina's advocatory conduct was intimately involved in "the judicial phase of criminal proceedings" and implemented the inherently prosecutorial decision to charge Mr. Fletcher. Accordingly, given the *nature* and *function* of Ms. Kalina's acts, she should be entitled to absolute immunity.[4]

(1993) (Kennedy, J., concurring in part and dissenting in part), that "[t]wo actors can take part in similar conduct and similar inquiries while doing so for different reasons and *to advance different functions*" (emphasis added).

[3] A helpful and effective analysis of this point is contained in the Brief for the United States as *Amicus Curiae* § F, at 24-28.

[4] *See* Petitioner's Brief on the Merits at 19-23. Arguments supporting this conclusion are persuasively made in the submissions of the *amici* appearing in support of Ms. Kalina. *See* Brief of *Amicus Curiae*, National District Attorneys' Association et al. at 3-5; Brief of National Association of Counties et al. as *Amicus Curiae* at 11-16; Brief for the United States as *Amicus Curiae* at 24-26.

II. THERE IS A PROFOUND DIFFERENCE BETWEEN A PROSECUTOR INITIATING A PROSECUTION AND A COMMON LAW COMPLAINING WITNESS.

Mr. Fletcher also attempts to analogize Ms. Kalina's conduct to that of a common law complaining witness. As with his effort to analogize this case to *Malley*, Mr. Fletcher's argument relies upon the proposition that one can resolve the immunity issue by labeling the act performed (i.e. the execution of a sworn statement), rather than by analyzing its nature and function. Allowing immunity to turn on the label attached to the act at issue, however, would ignore two decades of this Court's jurisprudence.[5] Indeed, the Solicitor General has explained this point in his *amicus* brief, and Mr. Fletcher offered no response. *See* Brief for the United States as *Amicus Curiae* at 12-18, 27-28 (containing a complete discussion of why the execution of a certification should be deemed an advocatory act similar to other proffers of evidence); *see also* Brief of the National Association of Counties et al. as *Amicus Curiae* at 16-18.[6]

This Court has noted that "[a]lthough public prosecutors and judges were accorded absolute immunity at common law, such protection did not extend to complaining

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[5] It also would ignore the relevant common law authority embodied in numerous cases. *See, e.g., Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927) (per curiam); *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896); and *Watts v. Gerking*, 222 P. 318, 228 P. 135 (Ore. 1924). These cases uniformly extend immunity to the prosecutor regardless of the role the prosecutor played in the arrest process. The only common law case Mr. Fletcher cites in support of denying absolute immunity to a prosecutor for making false representations in support of an arrest warrant is *Leong Yau v. Carden*, 23 Haw. 362 (1916). The reasoning of *Leong Yau*, however, was rejected by this Court in both *Imbler* and in its affirmance of *Yaselli*. *See Imbler*, 424 U.S. at 422 n.19; *Yaselli*, 12 F.2d at 405-06, *aff'd*, 275 U.S. 503 (1927) (per curiam).

[6] The complete argument concerning the complaining witness issue appears in the Brief of the National Association of Counties et al. as *Amicus Curiae* at 16-18, and especially at 17 n.3.

witnesses who . . . [as private parties] set the wheels of government in motion by instigating a legal action." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992) (citations omitted). Mr. Fletcher would have this Court ignore *Wyatt* and engage in a labeling exercise focused solely on the act performed (i.e. the execution of a sworn statement), rather than its nature and function.

Thus, as Mr. Fletcher's brief seems to concede, a prosecutor who presents evidence to a judge in support of a search warrant application is performing an advocatory act to which absolute immunity attaches. *See* Brief for Respondent at 19 (citing *Burns*, 500 U.S. at 491) . Here, then, Mr. Fletcher challenges only the manner in which Ms. Kalina presented the evidence (i.e. through a Certification summarizing the investigation), on the theory that Ms. Kalina's manner of presentation made her analogous to a complaining witness solely because she signed the Certification under oath.

Mr. Fletcher offers no reason why Ms. Kalina's written submission of evidence in the form of a sworn Certification should be given a different level of immunity than another form of submission having the same function. In substance, it should be irrelevant whether Ms. Kalina, as an advocate for the state, provided the "oath or affirmation" in support of the application for an arrest warrant or presented the facts to the court in some other fashion or by some other means. In each case, the advocatory function served is the same. Under this Court's functional analysis, deputy prosecutor Kalina is entitled to absolute immunity.

III. MS. KALINA HAS NOT SOUGHT AN EXPANSION OF THIS COURT'S FUNCTIONAL ANALYSIS OF ABSOLUTE IMMUNITY.

Ms. Kalina does not dispute that "most public officials are entitled only to qualified immunity," as Mr. Fletcher

argues, citing *Buckley*, 509 U.S. at 268.[7] Here, however, Ms. Kalina's conduct as an advocate for the state in filing criminal charges and executing a certification in support of an arrest warrant falls within the governmental functions which this Court has previously recognized as "deserv[ing] [of] absolute protection from damages liability." *Id.; see also Imbler*, 424 U.S. at 409.

Ms. Kalina has never asked the Court to grant her absolute immunity solely "by virtue of her position as a Deputy Prosecuting Attorney" [8] nor by "subtly modifying the Court's 'functional approach' to absolute immunity claims." *See* Brief for Respondent at 1, 6.[9] Ms. Kalina

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[7] *See also Richardson*, —— S. Ct. ——, 1997 WL 338548, at *5 (noting that public prison guards have been accorded qualified immunity).

[8] This Court has, however, recognized that prosecutors and judges, unlike other public officials, routinely perform functions for which absolute immunity must be accorded:

> As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.

Clinton v. Jones, 117 S. Ct. 1636, 1643 (1997) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 202-04 (1979)).

[9] While a prosecutor's status as a prosecutor is relevant to determining the nature and function of a questioned act, it is not controlling. After all, only a prosecutor can act as an advocate for the state, not a police officer. Of course, not all conduct of a prosecutor is absolutely immune, only that which serves or advances the advocatory function. Certainly, as this Court has previously held, such non-advocatory actions of a prosecutor as giving legal advice to the police, engaging in investigative activities with expert witnesses, and holding a press conference are not absolutely immunized. *Burns*, 500 U.S. at 493 (regarding giving legal advice to police); *Buckley*,

asks only that the Court continue to apply its functional analysis as the Court has done consistently in prior cases by inquiring into the "'nature' and 'function' of [Ms. Kalina's] act, not the 'act itself.'" *Mirales*, 502 U.S. at 13; *see also Stump v. Sparkman*, 435 U.S. at 362.

CONCLUSION

For the foregoing reasons, Ms. Kalina respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit and the decision of the district court below and remand this matter to the district court for entry of a judgment of dismissal.

Respectfully submitted,

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509 U.S. at 274-75, 277 (regarding investigative activities and press conferences).